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6 UNITED STATES DISTRICT COURT
7 SOUTHERN DISTRICT OF CALIFORNIA

8 VICTORIA A. AMELINA and
9 MICHAEL S. SAPELKIN, husband and
10 wife,
11
12 Plaintiffs,

13 v.

14 SELENE FINANCE LP, a Delaware
15 Limited Partnership Company; JOE
16 DAVILA; and HILARY JACKSON ,
17 Defendants.

Case No.: 21-cv-00512-CAB-LL

**ORDER GRANTING MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**

[Doc. No. 23]

18 This matter is before the Court Defendants' motion to dismiss the first amended
19 complaint ("FAC"). The deadline for Plaintiffs' opposition to the motion has passed
20 without any filing from Plaintiffs. The lack of opposition permits the Court to grant the
21 motion a dismiss the FAC without prejudice on that basis alone. For the following reasons,
22 however, the motion is granted on its merits, and the FAC is dismissed with prejudice.

I. Background

23 On March 23, 2021, Plaintiffs filed the original complaint against Defendants (1)
24 Selene Finance LP ("Selene"), (2) Selene's President and Chief Executive Officer, Joe
25 Davila, and (3) Selene's Chief Financial Officer, Hilary Jackson. Defendants moved to
26 dismiss and strike the complaint, and the Court granted those motions and gave Plaintiffs
27 leave to amend at a hearing on June 17, 2021. On July 30, 2021, Plaintiffs filed the FAC.
28

1 Defendants filed a motion to dismiss on August 16, 2021, and Plaintiffs did not file an
2 opposition.

3 Notably, the FAC appears to have omitted numerous allegations that were in the
4 original complaint without adding any new factual allegations. It nevertheless asserts the
5 same two claims: (1) violation of the Real Estate Settlement Procedures Act (“RESPA”),
6 12 U.S.C. §§ 2601 *et seq.*; and violation of the Fair Debt Collection Practices Act
7 (“FDCPA”), 15 U.S.C. §§ 1692 *et seq.*, arising out of Plaintiffs’ efforts to obtain a mortgage
8 loan forbearance as a result of financial hardship they allegedly incurred due to the COVID-
9 19 pandemic. Aside from identifying the three defendants at the outset, the complaint does
10 not make any factual allegations specific to any of particular Defendant, making allegations
11 only against “Defendants” collectively.

12 According to the FAC, “sometime prior to March 2020, Defendants acquired the
13 servicing rights to Plaintiffs’ mortgage loan” [*Id.*] In March 2020, Plaintiffs allegedly
14 were current on the mortgage loan, but “experienced loss of income, corresponding
15 financial hardship, and applied for loss mitigation with Defendants.” [*Id.* at ¶ 15.] On
16 April 28, 2020, Plaintiffs “submitted their first written application for loss mitigation and
17 corresponding supporting documents.” [*Id.* at ¶ 20.] Defendants allegedly ignored this
18 request. [*Id.* at ¶¶ 22-23.]

19 On June 22, 2020, “Plaintiffs mailed to Defendants a formal Notice of Error (NOE1),
20 . . . outlining continued failure to process loss mitigation application as a clear servicing
21 error on the part of Defendants.” [*Id.* at ¶ 37.] Defendants allegedly “failed to acknowledge
22 receipt of the Notice of Error,” and otherwise failed to take action in response to the notice.
23 [*Id.* at ¶ 38.] Somewhat inconsistently with this allegation that Defendants did not
24 acknowledge the notice, the FAC also conclusorily alleges that “in their communications
25 with Plaintiffs on the matter Defendants intentionally misstated the status of the loan and
26 the status of the loss mitigation application in question.” [*Id.* at ¶ 40.]

27 On August 10, 2020, “Plaintiffs mailed to Defendants [] another application for loss
28 mitigation.” [*Id.* at ¶ 23.] Defendants responded to this application with a letter stating

1 that the “application is determined to be facially complete with regard to the information
2 we require to evaluate a loss mitigation application and we expect to complete our
3 evaluation of your application in 30 days of the date it was received,” and that they would
4 “make a decision on your request no later than 9/13/2020.” [*Id.* at ¶ 24.]

5 When Plaintiffs did not receive a further response from Defendants by September
6 13, 2020, they “mailed Defendants their second Notice of Error (NOE2) . . . outlining
7 failure to process Plaintiffs’ loss mitigation applications as a clear servicing error on the
8 part of Defendants.” [*Id.* at ¶ 41.] As with the first notice of error, Defendants allegedly
9 “failed to acknowledge the receipt of” this second notice while at the same time making
10 “intentional misstatements” in their communications with Plaintiffs about it. [*Id.* at ¶¶ 44,
11 45.]

12 On December 1, 2020, “Plaintiff mailed to the Defendants a third Notice of Error
13 (NOE3), unrelated to the loss mitigation issue discussed earlier.” [*Id.* at ¶ 46.] According
14 to the FAC, the error asserted in this notice “was that Defendant’s [sic] incorrectly changed
15 the adjustable interest rate and term of payment on the Plaintiffs’ mortgage effective
16 December 1st 2020, instead of loan anniversary on 5/1/2021, when such change might be
17 due.” [*Id.* at ¶ 48.] As with the prior notices of error, Defendants allegedly both failed to
18 acknowledge this notice while also making intentional misstatements in their
19 communications with Plaintiffs about it. [*Id.* at ¶¶ 51, 52.]

20 In their prayer for relief, Plaintiffs seek actual and statutory damages. As for actual
21 damages, the FAC alleges that Defendants’ actions with respect to the first notice of error
22 “resulted in actual damages in a form of foreclosure related fees and costs charged to the
23 account, inaccurate and incorrect loan [sic], inconvenience and emotional distress.” [*Id.* at
24 ¶¶ 39, 49.] With respect to the third notice of error, the FAC alleges that the allegedly
25 premature change to the interest rate caused Plaintiff’s mortgage payment to increase from
26 \$833.85/month to \$1,605.95/month, causing a total of \$3,860.50 in damages (5 months x
27 \$772.10), along with “inconvenience and emotional distress.” The FAC does not allege,
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1 however, that Plaintiffs actually paid this allegedly improperly increased mortgage
2 payment for the months of December 2020 through April 2021.

3 **II. Legal Standards**

4 The familiar legal standards apply to the motion to dismiss. To survive a motion to
5 dismiss under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted
6 as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S.
7 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Thus,
8 the Court “accept[s] factual allegations in the complaint as true and construe[s] the
9 pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire*
10 *& Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). On the other hand, the Court is
11 “not bound to accept as true a legal conclusion couched as a factual allegation.” *Iqbal*, 556
12 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). Nor is the Court “required to accept as
13 true allegations that contradict exhibits attached to the Complaint or matters properly
14 subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions
15 of fact, or unreasonable inferences.” *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998
16 (9th Cir. 2010). “In sum, for a complaint to survive a motion to dismiss, the non-conclusory
17 factual content, and reasonable inferences from that content, must be plausibly suggestive
18 of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969
19 (9th Cir. 2009) (quotation marks omitted).

20 **III. Discussion**

21 **A. Claims by Michael Sapelkin**

22 Section 6 of RESPA specifically provides that “[w]hoever fails to comply with any
23 provision of this section shall be liable to the *borrower* for each such failure.” 12 U.S.C. §
24 2605(f) (*emphasis added*). Thus, “[c]ourts have uniformly barred non-borrowers from
25 asserting RESPA claims.” *Aldana v. Bank of Am., N.A.*, No. CV 14-7489-GHK FFMX,
26 2014 WL 6750276, at *3 (C.D. Cal. Nov. 26, 2014). The FAC concedes that Sapelkin is
27 not a party to either the note or the deed of trust, alleging instead that he qualifies as a
28 borrower under RESPA because he is a “confirmed successor in interest,” who is treated

1 as a borrower. *See* 12 C.F.R. § 1024.30(d) (“A confirmed successor in interest shall be
 2 considered a borrower for purposes of § 1024.17 and this subpart.”). A “[c]onfirmed
 3 successor in interest means a successor in interest once a servicer has confirmed the
 4 successor in interest’s identity and ownership interest in a property that secures a mortgage
 5 loan” 12 C.F.R. § 1024.31. The FAC does not allege facts demonstrating that Selene
 6 confirmed Sapelkin’s identity and ownership interest in the property securing the
 7 mortgage. Accordingly, because the FAC does not allege facts that, if true, would support
 8 the conclusion that Sapelkin is either a borrower directly or a borrower by virtue of being
 9 a “confirmed successor in interest,” Sapelkin lacks standing to bring a RESPA claim.

10 Likewise, the FAC does not allege any debt collecting activity directed at Sapelkin.
 11 He is not a borrower on the mortgage loan, and there are no allegations that Defendants
 12 contacted Sapelkin in connection with collecting on Amelina’s mortgage loan. Therefore,
 13 the FAC also fails to state a claim for any violations of the FDCPA as to Sapelkin. *Cf.*
 14 *Green v. Central Mortgage Co.*, 2015 WL 5157479, *4 (N.D. Cal. 2015) (“Generally, [a]
 15 person who is not a party to a contract does not have standing either to seek its enforcement
 16 or to bring tort claims based on the contractual relationship. Courts thus have dismissed
 17 foreclosure-based claims – like [the plaintiff’s] negligent misrepresentation, fraud,
 18 wrongful foreclosure, UCL, cancellation of deed, and declaratory relief claims – by persons
 19 who were not parties to mortgage loans.”) (citations and internal quotation marks omitted).

20 In light of the foregoing, any claims by Sapelkin are dismissed.

21 **B. Claims Against Individual Defendants**

22 The FAC makes no factual allegations specific to any of the three defendants.
 23 Rather, it identifies the three defendants (Selene, its CEO and its former CFO), and then
 24 just makes allegations about “Defendants’” actions (or lack thereof). The complaint
 25 appears to attempt to hold the individuals liable by piercing the veil, but it makes only
 26 conclusory allegations that the Davila and Jackson “exert sufficient control and dominance
 27 over the Selene Finance LP . . . and misuse[] the corporate structure for personal gain and
 28 to avoid personal responsibility.” [Doc. No. 22 at ¶¶ 12-13.] There are no allegations that

1 either Davila or Jackson had any personal involvement in the servicing of Amelina's
 2 mortgage. Nor are there any factual allegations that would support piercing the veil against
 3 Davila and Jackson. Accordingly, the claims against Davila and Jackson are dismissed.

4 **C. Amelina's RESPA Claim**

5 "To state a claim under RESPA, plaintiffs must allege facts showing both the
 6 defendant's failure to comply with RESPA and actual damages to the borrower as a result
 7 of the failure." *Townsend v. Wells Fargo Bank, N.A.*, No. 18-CV-07382-NC, 2019 WL
 8 4145464, at *5 (N.D. Cal. Aug. 30, 2019) (internal quotation marks and citation omitted),
 9 *aff'd*, 831 F. App'x 338 (9th Cir. 2020). The vague and conclusory allegation of the types
 10 of damages purportedly suffered by Amelina as a result of the allegedly inadequate
 11 responses to the notices of error do not satisfy this requirement. The Ninth Circuit has yet
 12 to decide whether emotional distress satisfies the actual damages requirement for a RESPA
 13 claim, but even assuming it does, the FAC fails to include any plausible factual allegations
 14 how Defendants' failure to respond to the notices of error (assuming such failure even
 15 qualifies as a RESPA violation), and not Selene's efforts to foreclose, was the proximate
 16 cause of foreclosure fees or emotional distress suffered by Plaintiff. *Cf. York v. Bank of*
 17 *Am.*, No. 14-CV-02471-RS, 2015 WL 3561723, at *6 (N.D. Cal. June 8, 2015) ("Lacking
 18 averments of actual losses, let alone any link between such losses and [Defendant's]
 19 conduct, plaintiffs' RESPA claim as pleaded in the FAC must be dismissed.).

20 Moreover, any violations stemming from the loan modification requests do not
 21 trigger RESPA obligations on the part of Selene. "RESPA requires the servicer of a
 22 federally related mortgage loan to provide a timely written response to inquiries from
 23 borrowers regarding the servicing of their loans." *Medrano v. Flagstar Bank, FSB*, 704
 24 F.3d 661, 665 (9th Cir. 2012). However, "the statutory duty to respond does not arise with
 25 respect to *all* inquiries or complaints from borrowers to servicers." *Id.* at 666 (*emphasis* in
 26 original). "[R]equests for a loan modification or challenges to a loan's validity and terms
 27 fall beyond the scope of Section 2605(e)(1)(A)'s requirement that inquiries concern loan
 28 servicing issues." *York*, 2015 WL 3561723, at *5. "[B]ecause Plaintiffs' letters to [Selene]

1 . . . requested modification of various loan and mortgage documents, they were not
 2 qualified written requests relating to the servicing of Plaintiffs' loan. . . . 12 U.S.C. § 2605
 3 does not require a servicer to respond to such requests. . . ." *Medrano*, 704 F.3d at 667–
 4 68. Thus, Amelina may not maintain a RESPA claim based on the first and second notices
 5 of error for this reason as well.

6 As for the third notice of error, although it appears possible that it could have
 7 triggered a RESPA response obligation because it concerned a purported error in the
 8 calculation of the correct interest rate and monthly payment amount, a RESPA claim based
 9 on this notice still fails because the FAC does not adequately allege actual damages.
 10 Plaintiffs allege that this error resulted in damages of \$3860, which is the difference
 11 between what they think they should have owed and the amount Selene calculated they
 12 owed. These are only damages, however, if Plaintiffs actually paid the amount Selene said
 13 was due and if Selene actually was incorrect in its calculation. The FAC does not allege
 14 that Plaintiffs actually paid the purportedly incorrect amount, meaning there are no alleged
 15 damages resulting from an alleged miscalculation.

16 Accordingly, for all of the foregoing reasons, the FAC fails to state a claim for
 17 violation of RESPA by Selene.

18 **D. Amelina's FDCPA Claim**

19 "To state an FDCPA claim, a complaint must plead four elements: (1) the plaintiff
 20 is a 'consumer' within the meaning of 15 U.S.C. § 1692a(3); (2) the debt at issue arises out
 21 of a transaction entered into for personal purposes; (3) the defendant is a debt collector
 22 within the meaning of § 1692a(6); and (4) the defendant violated a provision of the
 23 FDCPA." *Peebles v. Seterus, Inc.*, No. 219CV00242JAMKJN, 2019 WL 4464126, at *2
 24 (E.D. Cal. Sept. 18, 2019). Here, the FAC alleges that Selene was the servicer on
 25 Amelina's mortgage loan. [Doc. No. 22 at ¶ 14.] It is well-established that . . . a loan
 26 servicer is not a 'debt collector' under the FDCPA." *Okada v. Green Tree*, No. C-10-0487
 27 JCS, 2010 WL 1573781, at *3 (N.D. Cal. Apr. 19, 2010). For this reason alone, the FAC
 28 fails to state a claim against Selene for violation of the FDCPA.

Moreover, even if Selene qualified as a debt collector under the FDCPA, the FAC fails to state a FDCPA claim with respect to at least the first and second notices of error. The gravamen of the FAC is that Selene ignored Amelina's loss mitigation requests. In other words, the FAC primarily complains of Selene's *lack* of communication with Amelina. Selene's alleged actions, or lack thereof, with respect to Amelina's loss mitigation requests were not "false, deceptive, or misleading representation[s] or means in connection with the collection of any debt." 15 U.S.C. § 1692e; *see generally Santoro v. CTC Foreclosure Service*, 12 Fed. Appx. 476, 480 (9th Cir. 2001) ("A letter suggesting loan workout options is not seeking to collect a debt."); *Bourgeois v. Ocwen Loan Servicing, LLC*, No. 15CV1655-GPC(BLM), 2016 WL 245526, at *8 (S.D. Cal. Jan. 21, 2016) (holding that "a letter simply acknowledging receipt of an inquiry, a mortgage assistance/hardship application, a mortgage assistance resources letter, and a letter regarding a borrower's request for mortgage assistance and application, . . . do not constitute 'debt collection' activity and cannot be a basis for a FDCPA claim.").

IV. Disposition

For the foregoing reasons, the motion to dismiss the FAC is **GRANTED**. Further, in light of Plaintiffs' failure to allege any additional facts to remedy the deficiencies in their original complaint, and their lack of opposition to the instant motion, the Court concludes that any further amendment would be futile. Accordingly, the FAC is **DISMISSED WITH PREJUDICE**. This case is **CLOSED**.

It is **SO ORDERED**.

Dated: September 20, 2021



Hon. Cathy Ann Bencivengo
United States District Judge